IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

RICKY D. RHODES PLAINTIFF

V. CIVIL ACTION NO. 4:94CV125-D-D

MARVIN RUNYON, JR., Postmaster General of the United States of America DEFENDANT

MEMORANDUM OPINION

The court comes now to consider defendant Marvin Runyon's motion for summary judgment. Plaintiff Ricky Rhodes, a black male, has sued the defendant alleging that he was separated from his job as a part time flexible carrier for the United States Postal Service because of his race in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e-16. The defendant contends that Rhodes was separated because of his inability to meet the requirements expected of postal employees. After a thorough review of the record in this cause, the undersigned finds that the defendant's motion for summary judgment is well taken, and the same shall be granted.

FACTUAL BACKGROUND

Prior to his career appointment with the Greenville Post Office which serves as the basis for this lawsuit, Rhodes received at least three "casual" or temporary appointments with the Greenville facility. He served as a "casual" from approximately June 1 to August 29, 1991; from August 30 to November 27, 1991; and from December 11 to December 31, 1991. On April 4, 1992, Rhodes received an appointment for a career position in Greenville as a

part time flexible carrier. However, as with all new employees, Rhodes was first required to undergo a 90-day probationary period.[1] As a probationary employee, Rhodes was subject to "separation" or termination at any time during that period.

Training for a new carrier consists of classroom orientation, driver training and placement with a more experienced carrier. New carriers walk the route with one or more experienced carriers and learn what to do by observing. A similar process is used to teach the new carrier how to "case" or sort the mail which he will deliver. Rhodes received this type of training; the record indicates that Rhodes was sent out with two different experienced employees: Leon Brown for four days and Thomas Matlock for two days.

Gertrude Campbell, a black female, supervised Rhodes during his probationary period. As Campbell had only recently been promoted to the position of supervisor, Rhodes was the first probationary employee under her supervision. Campbell conducted Rhodes' thirty (30)-day, sixty (60)-day, and eighty (80)-day evaluations. Rhodes was also assigned to Crossroads Station for a short period of time after his first evaluation where he was supervised by John Grossi, a white male. Campbell expected a carrier, during the probationary period, to become proficient in the casing of at least two routes. This entailed an ability to

[1]Probation is a limited period during which the Postal Service must train and evaluate new employees to determine if they possess the attitude, work habits and abilities that the agency desires in a permanent employee. Casual or temporary employees do not participate in a probationary program.

case, or sort, at least eighteen (18) letters and eight (8) "flats," or magazine-size mail, per minute on the route.[2] Rhodes never reached this level of proficiency, and after his last evaluation, Campbell indicated that she felt Rhodes should be separated and issued him a letter of separation dated June 25, 1992 -- Rhodes' last day in a pay status.

Subsequent to his separation, Rhodes filed an administrative complaint alleging that he had been discriminated against on the basis of race in connection with his separation. The Postal Service investigated the complaint and Rhodes elected to receive a final agency decision without a hearing as to his discrimination claim. The Postal Service issued its final decision on December 17, 1992, in which it found no discrimination in connection with Rhodes' separation. Adhering to administrative procedures, Rhodes appealed that decision to the Office of Federal Operations of the Equal Employment Opportunity Commission ("EEOC"). The EEOC also made no finding of discrimination in its decision issued April 20, 1993. Rhodes' subsequent request for reconsideration was denied April 10, 1994, and he filed the present suit in this court a month later.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

[2]Rhodes does not dispute that this standard of casing was the minimum level as generally required by the United States Postal Service.

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

DISCUSSION

I.

42 U.S.C. § 2000e-16 provides:

> **(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage**
>
> All personnel actions affecting employees or applicants for employment . . . in the United States Postal Service . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-16.

Given that disparate treatment[3] employment discrimination cases often involve elusive factual questions, the Supreme Court has established a three-step evidentiary framework that allocates the burden of production and establishes an orderly burden of proof. In a claim of race discrimination brought under Title VII where the plaintiff has no direct evidence of intent, the evidentiary procedure to be utilized was originally introduced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and recently reaffirmed in St. Mary's Honor Ctr. v. Hicks, 509 U.S. ---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); see also Portis v. First Nat'l Bank, 34 F.3d 325, 328 n.7 (5th Cir. 1994) (utilizing McDonnell Douglas framework in case with only inferential methods of proof); Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1087 (5th Cir. 1994) (same). As the first step under McDonnell Douglas, the plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. McDonnell Douglas, 411 U.S. at 802. If the plaintiff establishes a prima facie case, a presumption of unlawful discrimination arises and the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the termination." Whiting v. Jackson State Univ., 616 F.2d

[3]The ultimate issue in a disparate treatment suit is whether the employer intentionally discriminated against the plaintiff. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638 (5th Cir. 1985).

116, 121 (5th Cir. 1980). The employer need not prove the absence of a discriminatory motive. Id.

Once the employer articulates its nondiscriminatory reason, the burden shifts again to the plaintiff to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). Ultimately, the burden of persuasion rests on the plaintiff, who must establish the statutory violation by a preponderance of the evidence. Whiting, 616 F.2d at 121 (citing Jepsen v. Florida Board of Regents, 610 F.2d 1379, 1382 (5th Cir. 1980)). Even if the plaintiff succeeds in revealing the defendant's reasons for terminating him were false, he still bears the ultimate responsibility of proving the real reason was unlawful "intentional discrimination." See St. Mary's, 125 L.Ed.2d at 424 ("It is not enough to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."). With these principles in mind, the court now turns to the case at hand.

A. THE PRIMA FACIE CASE

To establish a prima facie case in a situation such as the case sub judice, the plaintiff must prove that:

(1) He is a member of a protected group;

(2) He was qualified for the job which he held or for which he was applying;

(3) He was discharged or not hired;

(4) After his application was denied or he was discharged, the employer filled the position with someone outside the protected group.

Marks v. Prattco, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979); see also Norris v. Hartmarx Specialty Stores, Inc., 913 F.2d 253, 254 (5th Cir. 1990) (noting same general standard applies both to refusal-to-hire cases and to discharge cases). Rhodes clearly has met both the first and third elements in proving his prima facie case. He is a member of a protected group in that he is a black man and he was discharged from his postal position. The court, however, is not persuaded that Rhodes has met the second and fourth elements, as discussed infra, and turns to guidance provided by the Fifth Circuit as to how lack of proof for a prima facie case affects a motion for summary judgment in an employment discrimination suit.

Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 642 (5th Cir. 1985), is particularly helpful because it explains the shifting roles discussed above in the context of an employer's motion for summary judgment.[4] At the summary judgment stage, the plaintiff need not present a prima facie case of discrimination, but must simply raise a genuine issue of material fact as to the existence of a prima facie case. Thornbrough, 760 F.2d at 641 n.8.

[4] Although Thornbrough addressed allegations of age discrimination in the RIF context, case law under the Age Discrimination and Employment Act has consistently been applied in other types of discrimination cases. See Williams v. Southwestern Bell Tel. Co., 718 F.2d 715, 718 n.2 (5th Cir. 1981).

This is why summary judgment is ordinarily "an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent." Id. at 640. However, when the plaintiff fails to raise a genuine issue of material fact, summary judgment is proper just as in any other context.

The Thornbrough Court addressed the issue of whether the plaintiff in that case should have survived summary judgment by making two inquiries:

> (1) Did [the plaintiff] present a genuine issue of fact as to the existence of a prima facie case, and (2) if so, did he present a genuine issue of fact as to whether the reasons articulated by the [defendant] for discharging him were pretextual?

Id. at 641. In this case, Rhodes has failed to create such a fact issue in that he has failed to prove his prima facie case by a preponderance of the evidence. The plaintiff has the burden of proving, or at least raising an issue of fact as to whether, he was qualified for the job from which he was discharged. Rhodes has failed to do this. The facts show that the proficiency rate generally required of postal employees is eighteen letters and eight flats per minute. It is undisputed that Rhodes never reached that required level. As such, he was not qualified for the job from which he was discharged; he has failed to create a genuine issue of material fact as to his qualifications.

The burden is also on the plaintiff to prove that the defendant employer filled the position from which the plaintiff was discharged with someone outside the plaintiff's protected class.

Rhodes has submitted that three white people[5] were hired as full time employees for the Greenville position from which he was discharged. See Affidavit of Ricky Rhodes, dated September 28, 1995, at 2 (hereinafter "Rhodes Aff."). Post office records conclusively indicate, however, that Theresa Shields has never held a career position in Greenville. See Supplemental Affidavit of Gertrude Campbell, dated October 21, 1995, at 3 (hereinafter "Campbell Supp. Aff."); Defendant's Exhibits E, F, G, H, and I (attached to Campbell Supp. Aff.). The records further indicate that Penny Denny and Richard W. Wolfe both received career appointments to, and completed their respective probationary periods in, the Cleveland, Mississippi facility.[6] Campbell Supp. Aff. at 2-3; Defendant's Exhibits A, B, C, and D (attached to Campbell Supp. Aff.). Denny was hired in 1988 and transferred to Greenville, Mississippi in March, 1991. Wolfe was hired in 1986 and transferred to Greenville in November, 1987. Rhodes did not receive his career appointment until April 4, 1992 and was not separated until June 25, 1992, events which occurred after both Denny and Wolfe had already been transferred to Greenville. Since both white employees were already hired even before Rhodes was hired, their employment cannot be bootstrapped to meet the fourth prong of the prima facie case. Rhodes has offered no evidence of any hires outside the protected group after his discharge nor any

[5]The three people named by Rhodes were Theresa Shields, Penny Denny, and Richard W. Wolfe.

[6]Since they were all hired initially in Cleveland, Campbell never supervised any of the three. Campbell Supp. Aff. at 3.

evidence that the Greenville Post Office continued seeking applications. Because Rhodes has created no genuine issue of material fact as to his qualifications or as to whether members outside the protected group were hired after his discharge, he has failed to meet even the minimal requirements of a prima facie case and summary judgment is appropriate on these grounds alone.

B. PRETEXT

Even assuming that he did establish a prima facie case, Rhodes has presented insufficient evidence tending to prove that Campbell's reasons for separating him were a pretext for discrimination.[7] At the outset, Rhodes' claim of race discrimination pushes the limits in that the person who terminated his employment is of his same race. See, e.g., Farias v. Bexar County Bd. of Trustees, 925 F.2d 866, 879 (5th Cir.), cert. denied, 502 U.S. 866, 112 S. Ct. 193, 116 L.Ed.2d 153 (1991). Furthermore, Rhodes has not disputed the fact that his casing rates never reached the expected level of proficiency.[8] Rhodes never addressed

[7]Contrary to what Rhodes contends, the court finds that Campbell was solely responsible for the separation decision. She was his immediate supervisor. She conducted his evaluations and informed him of those results. She made the decision and wrote the letter of separation. The fact that she needed a perfunctory approval for her actions in no way diminished her control over the situation. Neither does the fact that another supervisor offered her his opinion of Rhodes' abilities. The termination decision was Campbell's to make. See Campbell Supp. Aff. at 5, where she states she would have discharged Rhodes regardless of Grossi's opinion due to the problems she personally experienced with Rhodes.

[8]While the court relied on Rhodes' level of proficiency in finding that he was not qualified for the job from which he was discharged in the prima facie case discussion, this inadequacy was also offered by the defendant as one of several reasons for

the defendant's other articulated reasons for discharge. These included Rhodes' failure to follow instructions (see Campbell Depo., dated June 28, 1995, pp. 45, 81), his repeated misdelivery of mail, customer complaints about him, Rhodes' tendency to question Campbell's work orders and argue about assignments (see Campbell Aff., dated August 4, 1995, at 3-4), and the fact that Rhodes had to be repeatedly admonished about adhering to regulations including parking his vehicle safely and locking down the mail inside his vehicle. As such, even had this court found that Rhodes established a prima facie case, summary judgment would still be proper in that Rhodes failed to introduce any evidence of pretext. He created no genuine issue of material fact as to the defendant's articulated reasons for his discharge.

CONCLUSION

Rhodes failed to create a genuine issue of material fact as to the establishment of a prima facie case of race discrimination under Title VII. He was not qualified for the job from which he was discharged and he presented no credible evidence that his position remained open or that members outside his protected group were hired to fill his position. Irrespective of that issue which alone justifies granting the defendant's motion, Rhodes also did not meet his burden in regard to pretext. He failed to raise any inference that racial animus was the motivation behind his discharge. Because of the foregoing, the court finds the motion for summary judgment well taken and the same shall be granted.

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his discharge.

A separate order in accordance with this opinion shall issue this day.

THIS _____ day of October, 1995.

United States District Judge

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ORDER GRANTING SUMMARY JUDGMENT

Pursuant to a memorandum opinion entered this day, the court upon due consideration of defendant's motion for summary judgment, finds the said motion well taken and the same will be granted.

It is therefore ORDERED that:

1) defendant's motion for summary judgment as to plaintiff's claim of discrimination in violation of Title VII be, and it is hereby, GRANTED;

2) this case is DISMISSED.

All memoranda, depositions, affidavits and other materials considered by the court in granting defendant's motion for summary judgment are hereby incorporated into and made a part of the record in this cause.

SO ORDERED this ___ day of October, 1995.

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United States District Judge